K ANANDARAJ KRISHNASAMY

v.

DATO' DR VIJAYASINGAM & ANOR

HIGH COURT MALAYA, SEREMBAN
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-387-2004]
29 AUGUST 2005

CIVIL PROCEDURE: *Discovery - Inspection of documents - Application made by way of originating summons in reliance on Norwich Pharmacal principle - Purpose of a Norwich Pharmacal order - Whether plaintiff satisfied conditions for grant of a Norwich Pharmacal order - Whether application baseless and devoid of merits*

CIVIL PROCEDURE: *Discovery - Inspection of documents - Application made by way of originating summons - Power to order discovery of facts and documents under s. 25 Courts of Judicature Act 1964 read with para. 14 in Schedule to same - Principles applicable - Rules of the High Court 1980, O. 24 r. 1(1)*

This was an application by the plaintiff by way of originating summons praying for an order that the defendants do produce and furnish to the plaintiff the following documents: (i) medical reports pertaining to the plaintiff; and (ii) records, blood sample reports, notes, charts and documents pertaining to the treatment and medication given to the plaintiff between 1999 and 2003. The plaintiff's grounds of application were that he had a cause of action against the defendants in medical negligence and that the documents were required for the purpose of pleading particulars in the claim that was to be filed by him. The plaintiff urged the court to give a pre-action discovery order in accordance with the principle enunciated in the case of *Norwich Pharmacal Co. & Ors & Customs v. Excise Commissioners* ("Norwich Pharmacal order"). The defendants, however, submitted that the plaintiff was not entitled to the order sought because the plaintiff had failed to satisfy the conditions for the grant of a Norwich Pharmacal order, as he was not seeking to discover the identity of the wrongdoers. The plaintiff also relied on s. 25 of the Courts of Judicature Act 1964 ('the CJA') read with para. 14 in the Schedule to the CJA which related to the additional power of the High Court to order the discovery of facts and documents by any party or person.

Held (dismissing the application):

[1] A Norwich Pharmacal order is to serve the purpose of finding the identity of the wrongdoers. Hence, where the identity of those who were alleged to have committed the wrongful acts *vis-à-vis* the plaintiff were known to the plaintiff and had been cited, as in the instant application where the identity of the defendants was undoubted and known to the plaintiff, there was no question of the plaintiff obtaining the Norwich Pharmacal order for the same purpose. In the circumstances, the plaintiff's reliance on a Norwich Pharmacal order for the purpose of obtaining the documents, as opposed to the identity of the alleged wrongdoers, was completely baseless and devoid of merits. (p 90 b-e)

[2] Section 25(2) of the CJA and para. 14 in the Schedule to the CJA expressly require these powers to be exercised in accordance with any written law or rules of court relating to the same. In this context, the rules of court are set out in great detail in O. 24 of the Rules of the High Court 1980. The opening words of O. 24 r. 1(1) make it crystal clear that the process of discovery is to be set in motion after the close of pleadings in an action begun by writ. Hence, the first *sine qua non* is the filing of an action by writ and not, as in the instant case, by way of an originating summons. (p 91 c-f)

[2a] The next essential requirement is that the process of discovery is only available after the close of pleadings. In other words, it is available only by way of pre-trial discovery as opposed to pre-action discovery. There must, therefore, be a pending action before O. 24 r. 1(1) can be put into motion. In the instant case, in the absence of any pending action against the defendants, the plaintiff herein was not entitled to avail himself of the order for pre-action discovery. The plaintiff's application was eminently premature and misconceived. (pp 91 f - 92 b)

Case(s) referred to:

Abraham v. Law Society of Singapore [1991] 2 CLJ 1436; [1991] 4 CLJ 887 HC ***(foll)***

Ashworth Hospital Authority v. MGN Ltd [2002] 4 All ER 194 ***(refd)***

First Malaysia Finance Bhd v. Dato' Mohd Fathi Hj Ahmad [1993] 3 CLJ 329 ***(dist)***

Norwich Pharmacal Co & Ors and Customs v. Excise Commissioners [1974] AC 133 ***(dist)***

Legislation referred to:
Courts of Judicature Act 1964, s. 25(2), para 14 of schedule
Rules of the High Court 1980, O. 24 r. 1(1), O. 92

Rules of the Supreme Court [Sing], O. 24

Other source(s) referred to:
Malaysian High Court Practice, 1998 Desk Edn 1, MLJ, pp 1054-1074
Civil Practice in Singapore and Malaysia, Butterworths Asia 1997, pp 110-150

For the plaintiff - K Anandaraj; M/s Anandaraj, Paul & Assoc
For the defendants - Alice Loke Yee Ching SFC

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Application

The plaintiff *vide* this application by way of originating summons dated 8 April 2004 in enclosure (3) prays for an order that the defendants do produce and furnish to the plaintiff the following documents:

1. medical reports pertaining to the plaintiff; and
2. records, blood sample reports, notes, charts and documents pertaining to the treatment and medication given to the plaintiff between 1999 and 2003.

(These documents are collectively referred to as "the documents".)

The grounds of the plaintiff's application are that the plaintiff has a cause of action against the defendants in medical negligence and that the documents are required for the purpose of pleading particulars in the claim which is to be filed by the plaintiff.

The plaintiff has on 24 May 2005 filed a writ of summons in the High Court of Malaya in Seremban *vide* civil suit No. 21-2-2005 against the Director of Health and Medical Services Negeri Seremban, Dr. Vijayasingam and the Government of Malaysia, as defendants 1, 2 and 3 respectively.

Pre-action Discovery

The plaintiff who is an advocate and solicitor appeared in person. He urged the court to give a pre-action discovery order on the basis of *Norwich Pharmacal Co. and Others and Customs v. Excise Commissioners* [1974] AC 133 HL; *First Malaysia Finance Bhd v. Dato' Mohd Fathi bin Haji Ahmad* [1993] 3 CLJ 329 SC; and *Ashworth Hospital Authority v. MGN Ltd* [2002] 4 All ER 194 HL.

Miss Alice Loke Yee Ching learned senior federal counsel also referred to *Norwich Pharmacal, supra;* and *First Malaysia Finance, supra,* but submitted that the plaintiff is not entitled to the order sought herein because the plaintiff has failed to satisfy the conditions for the grant of the order as the plaintiff is not seeking to discover the identity of the wrongdoers within the principle in *Norwich Pharmacal, supra,* and that the plaintiff was in no doubt as to the identity of the defendants.

It is abundantly clear to me that the above submissions have established a common ground ie, that the court has the jurisdiction to make a pre-action discovery order in accordance with the principle enunciated in *Norwich Pharmacal, supra.*

For brevity and convenience, I shall refer to the order sought by the plaintiff as Norwich Pharmacal Order, which was also the term used by the then Supreme Court in *First Malaysia Finance, supra.*

In this regard, it is useful to refer to the salient facts. *Norwich Pharmacal Co.* was the patent owner and licensee for a chemical compound. It appeared that the patent was being infringed by illicit importations of the compound manufactured abroad. In order to obtain the names and addresses of the importers, Norwich Pharmacal Co. brought actions against the Commissioners of Customs and Excise ("the Commissioners") seeking, *inter alia,* orders for the disclosure of the relevant information. The appeal before the House of Lords proceeded solely on the basis of an action for discovery.

The House of Lords held that:

1. where a person, albeit innocently and without incurring any personal liability, became involved in the tortious acts of others, he came under a duty to assist one injured by those acts by giving him full information by way of discovery and disclosing the identity of the wrongdoers, and for that purpose it mattered not that such involvement was the result of voluntary action or the consequence of the performance of a duty statutory or otherwise; and accordingly, *prima facie,* the Commissioners were under a duty to disclose the information sought; and

2. in the circumstances, there was no head of public policy nor statutory provision which precluded the making of an order for discovery.

The House of Lords judgment was judicially considered in Malaysia in *First Malaysia Finance, supra.* Edgar Joseph Jr SCJ (as he then was), speaking for the Supreme Court, explained that to the general rule in *Norwich Pharmacal, supra,* that discovery to find the identity of the wrongdoer is

available against anyone against whom the plaintiff has a cause of action in relation to the same wrong, there is an exception ie, that if, through no fault of his own, a person gets mixed up in the tortious acts of others so as to facilitate the wrongdoing, whilst he may incur no personal liability, yet he is under a legal duty to assist the person who had been wronged by giving him full information and in making disclosure of the identity of the wrongdoers.

In my view, the speeches of the Law Lords in *Norwich Pharmacal, supra,* and the judgment of the Supreme Court in *First Malaysia Finance, supra,* established that the Norwich Pharmacal Order is to serve the purpose of finding the identity of the wrongdoers.

Hence, where the identity of those who were alleged to have committed the wrongful acts *vis-à-vis* the plaintiff were known to the plaintiff and had been cited eg, as the first to the fourth defendants in *First Malaysia Finance, supra,* or in the instant application before me where the identity of the defendants is undoubted and known to the plaintiff, there is no question of the plaintiff obtaining the Norwich Pharmacal Order for the same purpose.

The principle that the disclosure jurisdiction is to be exercised for the purpose of establishing the identity of the alleged wrongdoers has been further affirmed by the House of Lords in *Ashworth Hospital Authority, supra.*

In the circumstances, I hold that the plaintiff's reliance on *Norwich Pharmacal, supra,* for the purpose of obtaining the documents, as opposed to the identity of the alleged wrongdoers, is completely baseless and devoid of merits.

Pre-trial Discovery

The plaintiff further relied on s. 25 read with para 14 in the Schedule to the Courts of Judicature Act 1964.

The defendants' response is that the plaintiff's submission is wholly misconceived.

I shall now refer to s. 25(2) of the Courts of Judicature Act 1964 which reads as follows:

> **25 Powers of the High Court**
>
> (1) …
>
> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
>
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

The additional powers of the High Court contained in s. 25(2) have been set out in the Schedule to the 1964 Act. The provisions relevant to the plaintiff's application may be found in para 14 thereof which merits reproduction as follows:

> **14 Discovery and interrogatories**
>
> Power to order discovery of facts or documents by any party or person in such manner as may be prescribed by rules of court.

It is significant to observe that s. 25(2) and para 14 expressly require that these powers are to be exercised in accordance with any written law or rules of court relating to the same. In this context, the rules of court are set out in great detail in O. 24 of the Rules of the High Court 1980. It suffices for me to refer to O. 24 r. 1(1) as follows:

> **1 Mutual discovery of documents (O. 24 r. 1)**
>
> (1) **After the close of pleadings in an action begun by writ** there shall, subject to and in accordance with the provisions of this Order, be discovery by the parties to the action of the documents which are or have been in their possession, custody or power relating to matters in question in the action. (emphasis added)

The opening words of O. 24 r. 1(1) make it crystal clear that the process of discovery is to be set in motion after the close of pleadings in an action begun by writ.

Hence, the first *sine qua non* is the filing of an action by writ and not as in the instant case by way of an originating summons.

The next essential requirement is that the process of discovery is only available after the close of pleadings. In other words, it is available only by way of pre-trial discovery as opposed to pre-action discovery. There must therefore be a pending action before O. 24 r. 1(1) can be put into motion (see *Malaysian High Court Practice*, 1998 Desk Edn. 1, MLJ pp. 1054-1074; and *Civil Practice in Singapore and Malaysia*, Butterworths Asia 1997, pp 110-150).

In *Abraham v. Law Society of Singapore* [1991] 2 CLJ 1436; [1991] 4 CLJ 887, the plaintiff applied to the defendant for a copy of the inquiry committee report in relation to some disciplinary proceedings but the defendant's executive secretary indicated that the defendant would not accede to the plaintiff's request unless directed by the court. The plaintiff applied by way of originating summons for an order that he be supplied the same on the ground that he was entitled to it. There was no cause or matter pending against the defendant.

In invoking O. 24 of the Rules of the Supreme Court Singapore which is in *pari materia* with our O. 24, Rajendran J held that no order for discovery could be made against the defendant.

The facts in *Abraham, supra,* are strikingly similar to those before me. I am in entire agreement with the judgment there and accordingly hold that in the absence of any pending action against the defendants, the plaintiff herein is not entitled to avail himself of the order for pre-action discovery. In my view the plaintiff's application is eminently premature and misconceived.

Writ Of Summons No. 21-2-2005

Although the plaintiff has brought to my attention that after this application, he has filed the above writ of summons and statement of claim against three defendants, that writ is not before me. As a matter of fact, it is an entirely different action which has never been fixed for hearing and determination before me. In the circumstances, I am unable to express any opinion thereon.

Conclusion

As there is no merit in the plaintiff's application, I hereby dismiss it with costs.